Bussan, Traci

From: Wisconsin Prison Watch [wiprisonwatch@tds.net]
Sent: Monday, March 09, 2009 8:14 AM
To: Rep.Hebl
Subject: John Doe

March 9, 2009

Members of the Judiciary Committee,

I write in opposition to the proposed John Doe reforms.

There have been a lot of hysterical cries from the prison guards' union who claim John Doe filings are used to persecute guards.

The truth of the matter is, there are some abusive guards in the DOC system and the internal mechanisms are unable to control them. 95% of all complaints filed by prisoners against guards are dismissed by the Inmate Complaint Examiners, and many prisoners do not complain for fear of retaliation.

The system is either not willing or unable to clean its own house. John Doe complaints allow prisoners to get beyond the nepotism and cronyism of the internal complaint system and find some semblance of justice.

District Attorneys are not keen on prosecuting guards accused of abusing prisoners either. They are "team layers" and see themselves as part of the team along with police and prison guards upholding the law. They are not unbiased in their prosecutorial discretion. To allow them to filter reports of abuse will only increase the frustration and resignation building in the prisons.

The real and lasting way to stop (or slow) John Doe filings is to reform the Inmate Complaint Review System. Thwarting prisoners' access to the courts is a regressive way of dealing with the symptom of a disease while allowing the cause to continue growing.

Respectfully submitted,

Frank Van den Bosch
Wisconsin Prison Watch
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AFSCME
We Make America Happen

Monday, March 9, 2009

To: Members, Assembly Judiciary Committee

From: Marty Beil, Executive Director, AFSCME Council 24 (Wis. State Employees Union)
Susan McMurray, Lobbyist, AFSCME Council 11

Re: AB 78, John Doe Reform

Last week a substitute amendment to AB 78 was circulated among committee members.

We oppose the substitute amendment (LRB s0014/1) and respectfully ask the committee to **reject LRB s0014/1.**

The bill as written safeguards the right of citizens to have full access to the courts and establishes the necessary checks and balances to prevent the abuse of the law. It contains vital protections for public employees who have been the subject of dozens of frivolous and damaging John Doe complaints.

AB 78 is a delicately crafted measure which is the product of months of hard work of many people representing various interests.

Reforming the John Doe law is one of the top priorities for our union during this legislative session. AB 78, as written, is the proper vehicle for achieving that reform.

We ask members of the Assembly Judiciary Committee to reject this amendment and any other effort to undermine AB 78 and its Senate companion, SB 51.

Please contact Marty at 836-0024 or Susan at 279-9697 if you have any comments, thoughts or questions.

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Cc: Assembly Speaker Mike Sheridan
Senator Pat Kreitlow
Senator Lena Taylor
Senator Jon Erpenbach
Representative Gordon Hintz
Representative Richard Spanbauer
Rich Abelson, AFSCME Council 48
Rick Badger, AFSCME Council 40

Wisconsin State AFL-CIO ...the voice for working families.

David Newby, President • Sara J. Rogers, Exec. Vice President • Phillip L. Neuenfeldt, Secretary-Treasurer

To: Members of the Senate
From: Phil Neuenfeldt, Secretary-Treasurer
Date: March 23, 2009

Re: **Support for Senate Bill 51**
Modification to John Doe Proceeding

This legislation will help prevent the abuse of the state's John Doe proceeding. Some inmates in the correctional system have used it as a tool to harass corrections officers, probation and parole officers, and staff who work in mental health institutions, by requesting judges to initiate proceedings against staff based on unsubstantiated complaints. Under current law, anyone can bypass an investigation by the local district attorney and file a complaint directly with a judge alleging that a crime has been committed. Due to certain limits on the scope of investigations that judges can conduct, this process has resulted in unfounded charges against public employees. As knowledge of this manipulation of the John Doe proceeding spreads within the correctional system, inmates can intimidate correctional officers by merely threatening to file a complaint with a judge. SB 51 is needed to address a worker protection issue that cannot be resolved within the collective bargaining process.

SB 51 provides that anyone can still file a complaint directly with a judge, but the complaint will be referred to the local district attorney who will issue a written decision within 90 days as to whether charges are warranted or not. A judge can then conduct further investigation, if necessary, and he/she will be able to review all relevant documents, unlike current procedures. This allows for a more careful process, but continues to ensure the right of any individual to file a complaint.

SB 51 is carefully crafted to balance access to our legal system with protections that are needed for dedicated public sector employees and the security of our correctional institutions. We urge your support for SB 51, without amendment.

PN/JR/ls:opeiu#9,afl-cio

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2009 Assembly Bill 78

My name is Steve Watters and I am the Director of the Sand Ridge Secure Treatment Center. I am testifying in favor of AB 78 on behalf of the Department of Health Services.

Sand Ridge Secure Treatment Center is the primary state facility for the detention and treatment of individuals committed under Ch. 980, which is commonly referred to as the State's Sexually Violent Persons Law. As a result, AB 78 is legislation which has significant implications for the institution and our staff. I also should note that the WI Resource Center, which detains and treats both Sexually Violent Persons and incarcerated inmates in need of mental health services, also has significant interest in AB 78.

Last year when I testified on AB695, which was an effort to revise the John Doe process, I reported that Chapter 980 patients had not yet used John Doe proceedings to harass staff at either of the DHS facilities. However, I noted that the publicity about this process had sparked an interest on the part of at least some patients about potentially using the John Doe process. During the intervening year, Chapter 980 patients have in fact filed a number of John Doe complaints against DHS staff. At Sand Ridge, I am aware of at least three John Doe complaints filed with Juneau County Courts relative to incidents at the facility, and I am aware of at least one John Doe complaint filed in Winnebago County by a Chapter 980 patient at the Wisconsin Resource Center. Fortunately, all of these cases were dismissed by the Courts after a review of the documents without any further proceedings.

Since the John Doe complaints filed by Chapter 980 patients have thus far been resolved without significant controversy, a question may be asked why DHS is supporting a revision of the John Doe process. My answer to that is threefold:

1. We have seen the potential negative impacts that the current John Doe process can have on DOC institutions and employees. Understandably, we do not want to see those impacts on DHS institutions and employees.

2. The current John Doe process is being used by a small number of Ch. 980 patients to attempt to intimidate and/or harass staff at DHS institutions from doing their jobs. While

their efforts have thus far not been successful, it takes only one case to send a very bad message.

3. At our DHS institutions, we routinely expect our staff to interact with and control some very challenging and difficult patients. As the employer, we have always committed to our staff that if they do the right thing in the manner that they have been trained, the institution will back them 100%. However, the current John Doe process has the potential to render that commitment somewhat hollow.

We believe that the revision of the John Doe process proposed in AB78 would be a significant reform and would restore the commitment that the State will back its employees in the legitimate performance of their responsibilities at the State's institutions.

Thank you.

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE

J.B. VAN HOLLEN
ATTORNEY GENERAL

Raymond P. Taffora
Deputy Attorney General

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608/266-1221
TTY 1-800-947-3529

TO: Members, Senate Committee on Judiciary, Corrections, Insurance, Campaign Finance Reform, and Housing

FR: Attorney General J.B. Van Hollen

DT: February 25, 2009

RE: Testimony on 2009 Senate Bill 51

ATTACHMENTS: Alternate John Doe Reform Proposal Supported by Attorney General

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I fully agree that the John Doe statute should be reformed. Too many lives have been disrupted by—and too many state and local resources spent on—frivolous, inmate-initiated, John Doe proceedings. While this bill would make some improvements to existing law, it is the wrong approach to reform. This bill's solution to the problem of frivolous John Doe complaints is not to prevent them, but to spend more state and local money and involve more judicial and prosecutor resources to relieve only a fraction of the harm caused by citizen- and inmate-initiated John Doe complaints.

There is a simpler solution. I propose that we let judges be judges and our elected prosecutors be prosecutors. I propose we properly limit the initiation of criminal inquest proceedings and the filing of criminal charges to district attorneys. My reform would:

- Provide more protection to state employees
- Save state and local taxpayer-funded resources
- Restore proper notions of separation of powers; and
- Enhance judicial impartiality in criminal proceedings

In these tight fiscal times, it is all the more imperative to reform bad law in a way that *saves* taxpayer money and more thoroughly solves the problems existing law creates. My proposal will do that.

Understanding the problem with the current John Doe statute and the proposed legislation begins by recognizing two fundamental principles of our criminal justice system.

First, in our system, crimes are offenses not just against crime victims, but against the public at large. It follows that it is the public's representatives—in Wisconsin, the elected

district attorneys—who prosecute crimes. Criminal punishment does not exist merely to serve as retribution. It exists to achieve society's broader goal of deterrence and also to express the community's condemnation of criminal behavior. This is why criminal cases are not captioned *Smith v. Jones*. They are captioned *State v. Jones*, and in some states, *People v. Jones*.

The second fundamental principle of our criminal justice system is that the role of a prosecutor is different than the role of a judge. It is antithetical to the traditional American conception of justice—and threatens the actual and perceived impartiality of the administration of justice—to have judges act as prosecutors, initiating criminal charges and then presiding or sitting in judgment of those charges.

The John Doe statute, both as it exists and as under the proposed reform, violates both of these fundamental principles. Citizens, not just elected and accountable prosecutors, may initiate this criminal inquest proceeding. Judges, not just elected and accountable prosecutors, may file criminal charges.[1]

The John Doe proceeding serves an important and legitimate law enforcement purpose when initiated by a prosecutor. It is used by prosecutors as a tool to investigate crime. The key advantage to using the John Doe proceeding is that prosecutors can have witnesses subpoenaed, who are thus compelled to testify (while preserving the right against self-incrimination). In the federal system, grand jury proceedings serve this purpose.[2]

To the inmate or citizen, however, a John Doe proceeding is a tool to act as a private district attorney, albeit one with limited powers. Most charitably, inmates or citizens often invoke this process to right a perceived wrong, and they often do so because of a general frustration with "the system." Sometimes this frustration is occasioned by a prosecutor's decision not to prosecute. Sometimes prosecutors are never informed of the underlying complaints. And sometimes citizens or inmates appear to use John Doe proceedings to harass authority or to gain advantage in a private lawsuit.

As the committee is aware, the John Doe proceeding can involve great expense. At a minimum, courts must clear their dockets and hold a hearing. Other cases are subsequently delayed. In a matter involving an inmate's allegation that a crime has been committed by a corrections officer, the inmate-complainant (and possible other inmate-witnesses) may need to be taken out of prison to attend court. Public employees will need to provide secured transportation to court. Other witnesses, such as Department of Corrections personnel, might be taken away from the job while the state pays for them to attend a day in court. The potential cost to innocent state employees, too, is quite real, in terms of legal bills and emotional distress.

To what positive end is this extraordinary cost? In a nutshell: none.

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[1] This latter problem is duplicated in Wis. Stat. § 968.02(3), which I believe should be repealed.
[2] Grand juries can also be convened under Wisconsin law, but this is rarely done.

Importantly, **no rights are denied if citizens and inmates are prevented from invoking John Doe proceedings.** Though some argue that John Doe proceedings provide citizens "their day in court," this rationale fundamentally misconstrues the nature of a John Doe proceeding. John Doe proceedings are *inquests*, they do not adjudicate claims. Even if a citizen-initiated John Doe proceeding results in the judicial issuance of the complaint, it is ultimately the responsibility of an appointed special prosecutor to proceed with the prosecution. Frequently, these prosecutors will dismiss the charges after reviewing the case. Of course, this occurs only after taxpayers have paid for the services of the special prosecutor and after the defendant has suffered significant monetary and other costs.

Nowhere else in the statutes do citizens have special rights to conduct criminal investigations. It would strike most people as eminently sensible that a private citizen can not fill out a probable cause affidavit and obtain a warrant to search his or her neighbor's home. Similarly, the ability to conduct criminal investigations through use of the John Doe proceeding should be limited to prosecutors who are accountable to the public and have sworn an oath.

Significantly, without the ability to seek a John Doe proceeding, individuals will continue to have access to our courts. These individuals will continue to be able to bring private rights of action if they have suffered a legally cognizable harm.

I have heard it argued that another reason to provide citizens the ability to initiate a John Doe proceeding and to allow judges to issue criminal complaints is to serve as a check on prosecutors who fail to prosecute cases where there is cause to do so.

First, this argument ignores the reality that prosecutors *must* exercise their judgment and discretion in determining whether or not to bring charges in a particular case. The charging decision is based on a variety of factors, including the reliability of the evidence and the nature of the conduct. A prosecutor evaluates these factors using his or her intellect, wisdom, expertise, and experience. Sometimes it is in the interest of justice to prosecute a crime to the full extent permitted by law. Other times, justice is achieved through plea bargains, by not issuing criminal charges, or by deferring prosecution. And always, as a prosecutor tries to satisfy the community's goals of criminal justice in an individual case, he or she must recognize the reality of limited resources. A prosecutor must manage these resources to further the same goals in other cases.

Reasonable minds might differ with how to exercise this judgment and discretion with respect to a charging decision in an individual case. But we elect district attorneys largely on the basis of how we believe the district attorney will exercise his or her judgment and discretion. **If the public does not agree with how a district attorney performs his or her functions, then the remedy is at the ballot box.**

In cases where the failure to bring charges is a capricious exercise of discretion, the law provides other avenues to enable criminal prosecution. If the prosecutor's inaction is due to a conflict, then the court can appoint special counsel. In any situation, the governor can appoint special

counsel to bring a criminal action. Similarly, the governor can remove a district attorney for cause.

Second, the argument presumes there *is* improper prosecutorial conduct relating to the failure to file charges. But there is no evidence that this is the case, or that if this is the case, that inmate- and citizen-initiated John Doe proceedings are an effective backstop against prosecutorial inaction. **Empirically, inmate- and citizen-initiated John Doe proceedings simply do not result in criminal convictions.** Rarely is a criminal complaint issued as a result of these proceedings. And even when criminal complaints are issued, the most frequent outcome is voluntary dismissal. I asked my staff to identify a single sustained criminal conviction that arose from a citizen-initiated John Doe proceeding. None were identified.

Citizen-initiated John Doe proceedings are expensive, ineffective, and offend traditional conceptions of criminal justice designed to promote impartiality. The abuses that this bill aims to correct are real, and this bill may well improve current law.

But I believe this bill is the wrong approach.

Would you want a prosecutor to file charges and then sit in judgment of those charged? I am sure your answer is no. We should not permit judges to do so either. Would you want unaccountable individuals—including those incarcerated—to expend and consume state resources to exercise the awesome power of the criminal justice system to investigate crime, possibly even in secret? I expect your answer is also no.

And that is why respectfully urge you to say no to this bill, no to the status quo, and yes to my proposal that solves John Doe abuse.

ATTORNEY GENERAL VAN HOLLEN'S PROPOSED
JOHN DOE REFORM

986.26 of the statutes is amended to read:

968.26 John Doe proceeding.

(1) IN GENERAL. If a district attorney complains to a judge that he or she has reason to believe that a crime has been committed within his or her jurisdiction, the judge shall convene a John Doe proceeding. The attorney general may file a John Doe complaint where the attorney general has reason to believe that a district attorney, assistant district attorney, or judge has committed a crime in the jurisdiction, whereupon a John Doe proceeding shall be convened. The attorney general's complaint shall be filed with the chief judge of the judicial district where the crime is believed to have been committed who shall assign a judge to preside over the proceeding. In any proceeding initiated by the attorney general, he or she shall have all of the powers of a district attorney as set forth in this section.

(2) SUBPOENAS. The judge, at the request of the district attorney, shall subpoena witnesses. The judge shall issue subpoenas for records upon certification by the district attorney that the information likely to be obtained by the subpoena is relevant to the investigation.

(3) EXAMINATION. The district attorney shall examine the witnesses under oath to ascertain whether a crime has been committed and by whom committed. Any witnesses examined under this section may have counsel present at the examination but the counsel shall not be allowed to examine his or her client, cross-examine other witnesses or argue before the judge. Counsel may consult with his or her client while the client is being examined. The examination may be adjourned and the extent of the examination is within the judge's discretion.

(4) SECRECY. The proceeding shall be secret unless otherwise ordered by the judge. Subject to s. 971.23, if the proceeding is secret, the record of the proceeding and the testimony taken shall not be open to inspection by anyone except the district attorney or upon the subpoena of a federal grand jury unless it is used by the prosecution at the preliminary hearing or the trial of the accused and then only to the extent that it is so used.

(5) IMMUNITY. The judge, on the motion of the district attorney, may compel a person to testify or produce evidence under s. 972.08(1). The person is immune from prosecution as provided in s. 972.08(1), subject to the restrictions under s. 972.085.

(6) CHARGES. The district attorney shall determine whether to issue a criminal complaint. Where the attorney general has determined to issue a complaint under this section, the attorney general shall have all of the powers of a district attorney to prosecute the complaint.

978.045 of the statutes is amended to read:

(1r)(i) There is reason to believe a crime has been committed by the district attorney within the district attorney's jurisdiction.

968.02(3) of the statutes is repealed.

969.01(3) is amended as follows:

(3) Bail for witness. If it appears by affidavit that the testimony of a person is material in any felony criminal or John Doe proceeding and that it may become impracticable to secure the person's presence by subpoena, the judge may require such person to give bail for the person's appearance as a witness. If the witness is not in court, a warrant for the person's arrest may be issued and upon return thereof the court or John Doe judge may require the person to give bail as provided in s. 969.03 for the person's appearance as a witness. If the person fails to give bail, the person may be committed to the custody of the sheriff for a period not to exceed 15 days within which time the person's deposition shall be taken as provided in s. 967.04.

972.08 is amended as follows:

(1) (a) Whenever any person refuses to testify or to produce books, papers or documents when required to do so before any grand jury, in a proceeding under s. 968.26 or at a preliminary examination, criminal hearing or trial for the reason that the testimony or evidence required of him or her may tend to incriminate him or her or subject him or her to a forfeiture or penalty, the person may nevertheless be compelled to testify or produce the evidence by order of the court or John Doe judge on motion of the district attorney. No person who testifies or produces evidence in obedience to the command of the court in that case may be liable to any forfeiture or penalty for or on account of testifying or producing evidence, but no person may be exempted from prosecution and punishment for perjury or false swearing committed in so testifying.

(b) The immunity provided under par. (a) is subject to the restrictions under s. 972.085.

(2) Whenever a witness attending in any court trial or appearing before any grand jury or John Doe investigation fails or refuses without just cause to comply with an order of the court or John Doe judge under this section to give testimony in response to a question or with respect to any matter, the court or John Doe judge, upon such failure or refusal, or when such failure or refusal is duly brought to its attention, may summarily order the witness's confinement at a suitable place until such time as the witness is willing to give such testimony or until such trial, grand jury term or John Doe investigation is concluded but in no case exceeding one year. No person confined under this section shall be admitted to bail pending the determination of an appeal taken by the person from the order of confinement.

Subject: SB51/AB78
Senators and Representatives:

I am contacting you to ask that you support SB51/AB78, which would reform the outmoded John Doe law. These companion bills make needed reforms which make it harder for individuals to abuse the law by filing frivolous claims against public employees.

The current John Doe law has been exploited by convicted criminals, forcing corrections staff to mount costly defenses against bogus claims, even after investigations by the Department of Corrections and the local District Attorney have shown these claims to be baseless. The bill before the committee was prompted after a Dodge County judge filed felony charges, solely on the word of an inmate, against a Waupun Correctional Institution Officer in 2007. The judge argued that the John Doe statute and case law interpretations prohibited him from considering the full scope of evidence and testimony of witnesses. The case pointed to a flaw in the law that must be addressed to protect everyone from frivolous John Doe complaints.

SB51/AB78 protect against frivolous John Doe claims in several ways:

1. It requires that judges refer all John Doe complaints to district attorneys for review before the judge may act on them. This is not required under current law. Inmates have found that they can bypass the scrutiny of district attorneys and force judges to initiate proceedings, regardless of evidence.

2. It requires district attorneys to look into complaints and issue written recommendations to judges within 90 days on whether or not charges should be filed.

3. It allows judges to consider evidence and the testimony of witnesses in any John Doe case that comes before them.

4. It requires judges to consider all evidence and the testimony of witnesses before felony charges may be filed.

5. It provides for payment of legal fees for state employees who face felony charges and who are later cleared of the charges.

The John Doe statute must be fixed to prevent frivolous complaints from being filed against public employees who are merely carrying out the duties of their job.

AB 78/SB 51 strike an ideal balance between respecting the rights of people to have full access to the courts and setting up the proper checks and balances to prevent frivolous complaints against public employees.

I ask you to please support SB51/AB78 as it is written, without amendment.

Regards,

Todd N. Wetzel
President-AFSCME Local 178 (Dodge Correctional Institution Employees)
SPS Representative-AFSCME Council 24 Executive Board
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